

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-017968

07/25/2024

HONORABLE CHRISTOPHER WHITTEN

CLERK OF THE COURT
J. Eaton
Deputy

ARIZONA FOR ABORTION ACCESS

DAVID ANDREW GAONA

v.

BEN TOMA, et al.

KORY A LANGHOFER

RHONDA L BARNES
KARA MARIE KARLSON
AUSTIN C YOST
ANDREW T FOX
MALVIKA A SINHA
THOMAS J. BASILE
KAREN HARTMAN-TELLEZ
KYLE ROBERT CUMMINGS
ELIZABETH A HIGGINS
DOCKET CV TX
JUDGE WHITTEN

MINUTE ENTRY

Prior to the commencement of today's hearing, Plaintiff's exhibits 1-5 are marked for identification.

East Court Building – Courtroom 413

12:01 p.m. This is the time set for an Evidentiary Hearing regarding Plaintiff's Application for Preliminary and Permanent Injunction, Special Action Relief, and Writ of Mandamus and Trial on the Merits (as agreed upon by the parties).

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Due to not all parties having the correct hearing link, participants slowly join the hearing.

The following participants appear virtually:

Counsel of record, David Andrew Gaona, and Co-counsel, Austin C. Yost, on behalf of Plaintiff Arizona for Abortion Access.

Counsel, Kory A. Langhofer, on behalf of Defendants Ben Toma, in his official capacity as Speaker and member of the House of Representatives for the State of Arizona; Warren Petersen, in his official capacity as President and member of the Senate for the State of Arizona; Shawwna Bolick, in her official capacity as a member of the Senate for the State of Arizona; Sonny Borrelli, in his official capacity as Republican Majority Leader and member of the Senate for the State of Arizona; Sine Kerr, in her official capacity as Republican Majority Whip and member of the Senate for the State of Arizona; Travis Grantham, in his official capacity as Speaker Pro Tempore and member of the House of Representatives for the State of Arizona; Teresa Martinez, in her official capacity as Republican Majority Whip and member of the House of Representatives for the State of Arizona; and Quang Nguyen, in his official capacity as a member of the House of Representatives for the State of Arizona.

Counsel, Rhonda L. Barnes, on behalf of Defendants Lupe Contreras, in her official capacity as Democrat Minority Leader and member of the House of Representatives for the State of Arizona; Nancy Gutierrez, in her official capacity as Democrat Minority Whip and member of the House of Representatives for the State of Arizona; Stephanie Stahl Hamilton, in her official capacity as a member of the House of Representatives for the State of Arizona.

Counsel, Elizabeth A. Higgins, on behalf of Defendants Denise “Mitzi” Epstein, in her official capacity as Democrat Minority Leader and member of the Senate for the State of Arizona; Brian Fernandez, in his official capacity as a member of the Senate for the State of Arizona; and Juan Mendez, in his official capacity as Assistant Democrat Minority Leader and member of the Senate for the State of Arizona.

Counsel, Karen Hartman-Tellez, for counsel of record, Kara Marie Karlson, on behalf of Defendant Adrian Fontes, in his official capacity as Secretary of State for the State of Arizona.

Court Reporter, Luz Franco, is present and a record of the proceedings is made digitally in addition to the court reporter.

Ms. Hartman-Tellez states the Secretary of State takes a nominal position in this matter.

Upon stipulation of the parties,

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Plaintiff's exhibits 1-5 are received in evidence.

Patricia Jane Habak is sworn in.

The Court is informed there is a problem with the livestream of the hearing. The Court's staff is attempting to fix it.

12:16 p.m. The livestream is working and the hearing proceeds.

The Court has read the papers filed in this matter as well as the stipulated facts of the parties.

Dr. Patricia Jane Habak testifies.

Dr. Habak disconnects from the hearing.

Arguments are presented and discussion is held.

IT IS ORDERED taking this matter under advisement.

12:44 p.m. Matter concludes.

LATER:

The only issue before the Court is whether the phrase "unborn human being" as approved by the Legislative Council is "an impartial analysis of the provisions of (the subject) ballot proposal" as required by A.R.S. § 19-124 (C). It is not.

How the Phrase was Chosen

The Secretary of State must prepare a publicity pamphlet, which is mailed to the households of all registered voters before the general election. That pamphlet is supposed to contain "an impartial analysis of the provisions of each ballot proposal." A.R.S. § 19-124 (C).

In whole, A.R.S. § 19-124 (C) provides:

Not later than ten days preceding the regular primary election the legislative council, after providing reasonable opportunity for comments by all legislators, shall prepare and file with the secretary of state an impartial analysis of the provisions of each ballot proposal of

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a measure or proposed amendment. The analysis shall include a description of the measure and shall be written in clear and concise terms avoiding technical terms wherever possible. The analysis may contain background information, including the effect of the measure on existing law, or any legislative enactment suspended by referendum, if the measure or referendum is approved or rejected.

The Legislative Council has proposed the following pamphlet language for the subject initiative:

Current state law prohibits a physician from performing an abortion if the probable gestational age of the unborn human being is more than 15 weeks, except when a pregnant woman's medical condition necessitates an immediate abortion to avert the pregnant woman's death or for which a delay creates a serious risk of substantial and irreversible impairment of a major bodily function.

Proposition ____ would amend the Arizona Constitution to:

...¹

Plaintiff takes issue with the underlined and italicized portion of the approved pamphlet language and brings this case to ask the Court to enjoin the Secretary of State from using it.

Analysis

Whether the wording approved by the Legislative Council is “an impartial analysis of the provisions of each ballot proposal of a measure or proposed amendment” is a question of law.

The Legislative Council's objective, neutral role differs greatly from that of a measure's proponents and opponents, who will of course “advocate with arguments that, needless to say, may be anything but neutral expositions.” *Ariz. Legislative Council v. Howe*, 192 Ariz. 378, 383 ¶ 13 (1998).

In *Fairness & Accountability in Ins. Reform v. Greene*, 180 Ariz. 582, 590 (1994), the Court held that the language used in the Legislative Council's analysis “must be free from any misleading tendency, whether of amplification, of omission, or of fallacy, and it must not be tinged with partisan coloring.” Employing “rhetorical strategy” in the crafting of wording of the analysis, therefore, is not compatible with the statute's impartiality requirement. *Citizens for Growth Mgmt. v. Groscost*, 199 Ariz. 73, 72 ¶ 6 (2000).

¹ Remainder of the proposed language omitted as it is not in dispute and emphasis added to the phrase that is in dispute.

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Even where the Council's chosen language is “neither inaccurate nor partial” it may still be used in a context that results in a misleading tendency. *Tobin v. Rea*, 231 Ariz. 189, 194 ¶ 6 (2013). The use of “provocative phrasing belie[s] neutrality and impermissibly advocate[s] against the measure.” *Id.* at 197 ¶ 33.

Defendants argue that the term “unborn human being” is taken directly from Arizona’s current law - A.R.S. § 36-2322(B), and therefore must be neutral. The court is not persuaded that every word chosen by the legislature in every statute it enacts is intended to be a neutral in character. There is no requirement that the legislature chose its words in such a way, and plenty of evidence that they sometimes do not.

Failing acceptance of this argument, it is hard to adopt the proposition urged by Defendants – that language which “describes current statutes by incorporating verbatim the language they employ is impartial as a matter of law.” (Republican Legislators’ Response at 2:14-15).

Other than arguing that the phrase “unborn human being” must be neutral as a matter of law because those words are used in A.R.S. § 36-2322(B), Defendants offer little to support their argument that it is impartial.

The term “unborn human being” is packed with emotional and partisan meaning, both for those who oppose abortion and for those who endorse a woman’s right to choose whether to have an abortion.

Conclusion

ACCORDINGLY, IT IS ORDERED granting Plaintiff’s request for special action relief, a permanent injunction and a writ of mandamus and ordering the Legislative Council to strike the phrase “unborn human being” from its description of the Arizona Abortion Access Act and, instead, adopt an impartial summary of the Initiative that replaces that phrase with a neutral term which complies with A.R.S. § 19–124 (C).

DATED this 25th day of July 2024

/s/ Christopher Whitten

HONORABLE CHRISTOPHER WHITTEN
JUDICIAL OFFICER OF THE SUPERIOR COURT